(4)

Supreme Court, U.S.
FILED
SEP 4 200
OFFICE OF THE CLERK

No. 01-136

In The

Supreme Court of the United States

MICHAEL KANE DUNKL and PHILIP ZOEBISCH,

Petitioners,

v.

THE CITY OF SAN DIEGO and SAN DIEGO PADRES,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeal
For The Fourth Appellate District, Division One

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES BRUCE HENDERSON
4294 Kendall Street
San Diego, CA 92109
(858) 273 8600

Counsel of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 PP

PETITIONERS HAVE CORRECTED THE ERROR LISTING MR. MAILHOT'S NAME IN PLACE OF MR. ZOEBISCH'S NAME AS THE SECOND PETITIONER IN THIS CASE

The City of San Diego correctly notes the error in the title of the Petition, namely, the substitution of Mr. Mailhot's name for that of Mr. Zoebisch. Mr. Mailhot was one of the parties hired to circulate the petition, but it was Philip Zoebisch who was a signatory who, along with Mr. Dunkl, was sued, as all the documents make clear. Mr. Zoebisch is the proper petitioner in this case, along with Mr. Dunkl, and the cover of the Reply To Opposition To Petition For Writ Of Certiorari has been amended accordingly.

PETITIONERS RAISED THE FEDERAL CONSTITUTIONAL ISSUES IN THEIR ANTI-SLAPP MOTION

The City of San Diego argues that Petitioners did not assert their First Amendment rights before the trial court or in their arguments before the Court of Appeal. This assertion is belied by the record. Petitioner's Appendix F sets forth the language of California's SLAPP statute which language constituted the basis for Petitioners' motion before the trial court and a primary focus of Petitioners' appeals. The statute and the cases cited by Petitioners refer specifically to the U.S. Constitution as well as the California Constitution. In short, the California courts were well aware that the First Amendment was at issue.

PETITIONERS PROPERLY CHARACTERIZE THE FACTS AND LAW OF THE CASE

A full briefing will amply demonstrate that Petitioners have properly characterized the facts and law of this case. Nothing cited by the City of San Diego nor by its joint business partner in their opposition briefs take away from the fundamental constitutional question presented in this case, namely, the chilling effect of lawsuits filed against circulators of a petition during the circulation period.

PETITIONERS ATTACHED ALL REQUIRED DOCUMENTS

All relevant documents are before the court. The issues in this case involve questions of law, not fact, and so the only relevant legal decision is that of the Court of Appeal, attached as Petitioners' Appendix B.

THE APPELLATE COURT DECISION CONFLICTS WITH BOTH CALIFORNIA AND FEDERAL CONSTITUTIONAL DECISIONS AS WELL AS THE U.S. CONSTITUTION

Neither Petitioners nor Respondents cite any case on point directly examining the question presented by this petition. However, Petitioners cite case law that by analogy readily supports their argument. Strictly speaking, the question presented may be one of first impression;

but the law is so clear that there is no need to wait for additional judicial review by other or lower courts.

THE PETITION IS NOT MOOT

This case is not moot. In the event the Petitioners' writ is granted and the decision of the Court of Appeal reversed under California's anti-SLAPP statute, the petition in issue can be recirculated since the legislative action affected by it remains operative and subject to amendment by initiative.

PETITIONERS DID NOT WAIVE THEIR CONSTITUTIONAL RIGHTS

The Padres argue that Section 8 of the proposed initiative (Petitioners' Appendix D, page A-48) constitutes a waiver by Petitioners of their constitutional rights. Since the provision is not operative until the initiative was adopted by the voters, it is not relevant to the circulation period. Since the condition has yet to occur, the provision has no present force or effect. By analogy, the Padres would have the court believe that an offer to waive Fifth Amendment rights in return for immunity from prosecution would operate as a waiver without regard to the condition precedent.

PRIVATE PARTIES MAY NOT UTILIZE THEIR ACCESS TO THE COURTS TO CHILL THE RIGHTS OF OTHERS TO PETITION GOVERNMENT WHERE ALTERNATIVE REMEDIES ARE READILY AVAILABLE

The Padres argue that the rule sought to be enforced by Petitioners would unlawfully impinge upon the constitutional rights of the Padres to seek judicial redress.

The issue in this case does involve competing rights, but what is decisive is the availability to the Padres of adequate, traditional alternatives. The standard remedy in California has been for private parties objecting to the legality of citizen initiatives to sue the appropriate elections officer and legislative body in order to obtain relief. By naming circulators as real parties in interest, no judicial relief is sought against the circulators themselves, rather the circulators are merely provided the opportunity to defend the legality of the petition.

While the question of whether Petitioners can even be named as real parties in interest in a lawsuit filed during the circulation period of an initiative petition is not presented to the court by the facts of this case, the Padres fail to make any argument that would suggest that the standard alternative of suing the relevant election officer and legislative body would not provide an adequate remedy to any wrong the Padres allege.

CONCLUSION

The chilling effect on petitioning in this case is as obvious as it is pernicious. The decision of the California courts complained of by Petitioners, like most cancers, is best dealt with immediately. Perhaps other courts will remedy the problem, but why wait and so risk that possibility that this First Amendment violation will grow and metastasize?

Adequate, simple legal alternatives exist that avoid the constitutional problem. There is no good reason to leave to tomorrow that which should be done today. The petition should, therefore, be granted.

Respectfully submitted,

JAMES BRUCE HENDERSON
4294 Kendall Street
San Diego, CA 92109
(858) 273 8600